No. 5, Original

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF CALIFORNIA

ON PETITION FOR REHEARING

RESPONSE OF THE UNITED STATES

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TABLE OF AUTHORITIES

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On June 9, 1980, the Court adopted the recommendation of its Special Master and ruled that 15 open pile piers and an artificial island connected to the mainland by a causeway are not part of the California "coastline" for purposes of measuring the grant to the State under the Submerged Lands Act. The State of California filed a Petition for Rehearing, and, by order of October 6, 1980, the Court requested a response. We oppose rehearing on the ground that the arguments now advanced were fully considered and properly rejected both by the Special Master and the Court. We agree, however, with the suggestion that the Court's opinion appropriately may be amended in one minor respect to conform to previous decisions in this case (Petition for Rehearing at 6; *infra*, page 5).

1. In its two substantive contentions California argues that the decision in this case will create uncertainty in future "tidelands" litigation and is inconsistent with the Special Master's Report. The State bases these arguments on the assumption that the Court was looking to a coastal structure's present function in determining whether it is part of the baseline. The only basis asserted for that characterization is footnote 5 to the Court's opinion, which, in pertinent part, reads as follows:

> The Master noted that though some shipping is handled at some of the piers, it is insufficient to justify defining them as "ports." For example, one of them is fitted with a coin-operated davit for lowering small boats into the water. We agree with this conclusion. * * *

From this, the State argues that the Court has determined that single piers with sufficient shipping would qualify as ports and, that, accordingly, the Court and its Special Masters henceforth will be burdened with determining the changing status of particular piers.[1]

We do not agree with the State's interpretation of footnote 5. A port is necessarily a place of transfer. Every place of transfer is not necessarily a port.[2] To say that a pier is not a port, and then note parenthetically that it does not even provide much of a port-like function, is not

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[1]Contrary to California's suggestion, the "pier" question is not likely to recur. We are informed that more than half of all of the piers which might affect the 3-mile limit are located off the California coast, the most substantial ones being those identified in these proceedings. Nowhere else along our coast is the status of a similar pier presently at issue.

[2]The primary meaning of the word "port" is "a place where ships may ride secure from storms: harbor, haven * * *." *Webster's Third New International Dictionary* 1767 (1976). As the Court's opinion points out, none of the isolated open-pile piers in this case meets that

to say that another open pile structure which handles more cargo or passengers would be considered part of the coast. The Court made clear that it was not opening this line of inquiry when, at pages 6 and 7 of its opinion, it reviewed the limits of the application of Article 8 and the artificial structures which would be considered part of the coastline under the Convention. In that discussion it emphasized that the Article applies to structures which provide protection to a water body or the beach and cannot be extended to encompass open pile structures which serve no such purpose.[3] This conclusion is entirely consistent with the Convention, its legislative history, prior decisions of this Court and the Special Master's Report herein.

California argues that future confusion could be avoided by making every permanent structure erected on the coast and jutting out to sea part of the legal coastline. As a matter of law, this Court has explained that such an interpretation far exceeds the intent of the Convention. As a matter of fact, it would not increase certainty. It is just as difficult to determine whether a structure is permanent as it is to determine whether at any given time it protects the coast (or serves as a port, as California would read footnote 5). Two structures on the California coast provide examples. One, known as the El Segundo Pier, was included as one of the points in issue before the Master and depicted in the State's pleading. Before the case was heard it was learned that the structure had

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description, and accordingly none of them satisfies the requirements of Article 8 of the Convention on the Territorial Sea & The Contiguous Zone, 15 U.S.T. 1606, T.I.A.S. No. 5639 (1958), (*United States* v. *California*, No. 5, Orig. (June 9, 1980), slip op. 5-6).

[3]It is true that a fact finder must make determinations as to construction and effect of a particular structure, but this, compared to most issues in tidelands litigation, is not particularly onerous.

disappeared and pleadings were amended accordingly. Report of the Special Master at 221. In its Petition for Rehearing, the State reports that the Santa Monica breakwater, already found to be part of the baseline because it is a coast protective work, *United States* v. *California*, 432 U.S. 40, 42 (1977), is falling apart. Like the natural coastline—which fluctuates with accretion and erosion—an artificial segment of the coastline may change. The Court's recent opinion adds no new uncertainty for tidelands litigation and California's recommended alternative test would add no additional certainty.[4]

2. Based on its reading of footnote 5, California concludes that the Court has misinterpreted the Special Master's findings. It clearly has not. The State assumes that the Court, through footnote 5, has set forth a new rule which permits the use of single open pile piers as basepoints if they qualify as port facilities, and then cites the Master's finding that five of these structures handle cargo and passengers to argue that they are, therefore, ports and part of the coastline.

First, we do not believe that the State correctly interprets footnote 5. The Court has not said that structures such as these piers will ever be considered parts of the coastline. In fact, at pages 5 and 6, it has said the opposite. However, even if the State is correct in its understanding of the footnote, it is clear that the Court understood the Master's finding. The Master did not find that any of the 16 piers is a port for purposes of the

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[4]Indeed, California argued the importance of these piers' function—past, present and potentially future—both in this Court and before the Special Master. The State also relied entirely on a "function" argument in support of its case for closing lines across the mouths of San Pedro and San Diego harbors. In the latter instances, it was successful and the United States took no exception.

Convention. He did refer to the Port Oxford Pier as a "port facility" and found that four others are used for transferring people or cargo. We believe that California places undue emphasis on the use of the term "port facility" and wrongly assumes that, because every port handles cargo, therefore any cargo handling facility is a port for purposes of this case.

At all events, footnote 5 indicates that the Court was aware of the extent to which these piers serve as "port facilities", and nevertheless concluded that they are not basepoints. Thus, even if California is right in its assumption that the Court was announcing a new rule for the future consideration of piers as basepoints, it is clear that it evaluated these piers on the terms suggested by California and found them not to qualify. We repeat, however, that we do not read the Court's opinion as announcing a new rule, but, rather, as adhering to its consistent position on the meaning of Article 8.

3. California's final comment is that at page 2 of the opinion, the Court implied that the California coastline is the mean low-water line, rather than the line of mean *lower* low water. We do not so read the opinion. The Court was merely following the terminology of the Convention on the Territorial Sea, which refers (in Article 3) to the normal baseline as "the low-water line along the coast as marked on large-scale charts officially recognized by the coastal state." In the case of California, where there are two low tides a day and the charted line reflects a mean of only the lower of those tides, this Court has ruled that the baseline is the lower-low water line. *United States* v. *California*, 381 U.S. 139, 175-176 (1965). The present decision does not undermine that holding.

Nevertheless, it is arguable that the recent opinion, read alone, might mislead the casual reader. Accordingly, we would not oppose a change in the language of page 2 of the opinion as proposed by California.

For the foregoing reasons, California's Petition for Rehearing should be denied.

Respectfully submitted.

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Solicitor General

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